(2)

No. 90-855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LUMBERMEN'S UNDERWRITING ALLIANCE,
Petitioner,

v.

ATLANTIC WOOD INDUSTRIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia

---

BRIEF OF THE RESPONDENT IN OPPOSITION

ARNOLD C. YOUNG
Counsel of Record
HUNTER, MACLEAN, EXLEY & DUNN, P.C.
P.O. Box 9848
Savannah, GA 31412
(912) 236-0266

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the "adequate and independent state grounds" doctrine precludes review of a Georgia Court of Appeals decision denying Petitioner's *de novo* motion to dismiss Respondent's pending appeal for reasons of *res judicata* founded on a foreign judgment, where such denial was based on the state appellate court's consistently applied jurisdictional restrictions and limited authority to dismiss appeals?

2. Whether under the facts of this case the Georgia Court of Appeals correctly denied Petitioner's motion to dismiss Respondent's appeal where Petitioner (1) failed to prove threshold requirements for the application of full faith and credit; (2) waived the *res judicata* defense under Georgia law by not filing a notice of appeal; and (3) asserted inconsistent positions in the Georgia Court of Appeals as to when the foreign judgment it sought to plead as *res judicata* became final?

RULE 29.1 STATEMENT

Respondent Atlantic Wood Industries, Inc., is an employee-owned, Georgia corporation, headquartered in Savannah, Georgia. Atlantic Wood Industries, Inc. has three wholly-owned subsidiaries: Atlantic Wood International Sales Corporation, Ltd., a U.S. Virgin Island corporation; Atlantic Leasing Company, a Georgia corporation; and Atlantic Wood Transport, Inc., a Georgia corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

CONSTITUTIONS

STATUTES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-855

LUMBERMEN'S UNDERWRITING ALLIANCE,
Petitioner,

v.

ATLANTIC WOOD INDUSTRIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia

---

BRIEF OF THE RESPONDENT IN OPPOSITION

Respondent Atlantic Wood Industries, Inc. ("AWI") submits this brief in opposition to petitioner Lumbermen's Underwriting Alliance's ("LUA") Petition for a Writ of Certiorari ("Pet." or "Petition").

COUNTER-STATEMENT OF THE CASE

AWI is a Georgia corporation, headquartered in Savannah, Georgia. AWI owns and operates wood treatment facilities, including one in Portsmouth, Virginia ("facility"), which it acquired in late 1985 from its predecessor-in-interest, its former parent company. In connection with that transfer of ownership, the parent assigned to AWI all assets, contracts, and specifically all claims the parent had under insurance policies covering the facility, including the primary property and comprehensive general liability policies issued by LUA. The policies in question here were issued in Georgia.

In 1986, the United States Environmental Protection Agency ("EPA") initiated an action against AWI alleging specified contamination at the facility and asserting AWI was liable therefor under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601, *et seq.* (1988). AWI engaged legal counsel and technical consultants to defend against the EPA action and signed an administrative consent order in 1987. The order requires AWI to undertake certain measures, which are currently underway. Most of AWI's insurers, including LUA, have refused to defend it or to pay any portion of its ongoing defense or other costs incurred in the EPA action.

A. Georgia Trial Court Proceedings And Rulings

AWI was forced to institute the Georgia action at issue here in the Superior Court of Chatham County, Georgia in April 1987, against LUA and other insurers of the facility because three insurers had already sued or were about to sue AWI in three different courts. In addition to LUA, which had instituted an action against AWI in Virginia state court,[1] one insurer sued AWI in the federal district court for the Eastern District of Virginia,[2] and another insurer had sued AWI in Chatham County, Georgia Superior Court.[3]

AWI's first amended complaint sought a declaration that the policies issued by the insurers to AWI's predecessor-in-interest were validly assigned to AWI giving it rights under those policies, and that the insurers had a duty to defend AWI. This complaint also alleged that the insurers had breached their duty to defend AWI

---

[1] *Lumbermen's Underwriting Alliance v. Atlantic Wood Indus., Inc.*, Law No. 86-L-350 (Henrico C'ty, Va. filed Sept. 11, 1986).

[2] *Argonaut Ins. Co. v. Atlantic Wood Indus., Inc.*, C.A. No. 87-323-R (E.D. Va. filed Apr. 16, 1987).

[3] *Ranger Ins. Co. v. Atlantic Wood Indus., Inc.*, No. 87-0335-B (Super. Ct. Chatham C'ty, Ga. filed Feb. 5, 1987).

against the EPA action. LUA and the other insurers raised a host of defenses in their answers based on certain terms and provisions in their respective policies.[4]

In the fall of 1988, all of the defendant insurers moved for partial summary judgment on only one of their many coverage defenses,[5] namely that they owed no duty to defend or indemnify AWI because the term "damages" in their policies only covered amounts paid as "legal" relief, whereas they alleged that the EPA action sought "equitable" relief. AWI opposed the insurers' motions on the merits, and cross moved requesting a ruling that the defenses raised in the insurers' motions did not negate their duty to defend AWI, and that AWI was a valid assignee under the policies issued by all of the insurers, including LUA.

After the hearing on the parties' partial summary judgment motions, LUA filed a motion in the trial court in March 1989 to dismiss AWI's "Amended Motion for Declaratory Judgment" [6] as barred by the doctrine of *res judicata* (Pet. App. D at D-5-12). This motion was based on the fact that a Virginia trial court had specifically ruled in LUA's favor on the "damages" question in February 1989,[7] and LUA's assertion that the Virginia

---

[4] They asserted, for example, that the EPA action did not seek "damages" and constitute a "suit" triggering the insurers' duty to defend; that the alleged contamination at the facility did not constitute "property damage"; and that the policies were not properly assigned to AWI by its predecessor-in-interest. LUA had raised similar defenses in the separate action it brought against AWI in Virginia state court; *see* Petition Appendix ("Pet. App.") D at D-13-14; D-19-21.

[5] The excess carriers also alleged that their duties were not triggered because the underlying coverage had not been exhausted.

[6] No pleading by that name was ever filed by AWI in the trial court.

[7] *Lumbermen's Underwriting Alliance v. Atlantic Wood Indus., Inc.*, Law No. 86-L-350 (Henrico C'ty, Va. Feb. 10, 1989) ("Virginia judgment").

judgment had become final on March 4, 1989 (Pet. App. D at D-7).[8] AWI opposed LUA's motion in the Georgia trial court.

On May 30, 1989, the Georgia trial court entered two orders in response to all the parties' partial summary judgment motions. In the order at issue here (Pet. App. A at A-13 ("LUA order")), the trial court granted the summary judgment motions of LUA and two excess insurers, ruling that they had no duty to defend or indemnify AWI because the term "damages" did not cover the relief sought in the EPA action. The LUA order, however, did not address the assignment issue raised by AWI in its cross-motion, even though the second order respecting another insurer decided the assignment issue in favor of AWI (Pet. App. A at A-7). The LUA order also did not grant LUA's motion to dismiss on *res judicata* grounds. Since the trial court reached the merits, LUA's *res judicata* motion was implicitly denied.

AWI filed an appeal of the LUA order, assigning error, *inter alia*, to the trial court's denial of AWI's summary judgment motion on the "damages" issue and its failure to rule in AWI's favor on the "assignment" issue. LUA, however, did not appeal the trial court's failure to grant its *res judicata* motion, despite the fact that the relief it sought, *i.e.*, dismissal, is not consistent with the judgment on the merits granted by the trial court.

B. Georgia Court Of Appeals Proceedings And Rulings

Instead of appealing the trial court's apparent denial of its motion to dismiss, LUA raised the *res judicata* and "estoppel by judgment" defenses *de novo* in the Georgia Court of Appeals by a motion to dismiss AWI's appeal based on allegedly new developments (Pet. App. C at

---

[8] In the Petition LUA now asserts that its motion in the trial court "rested upon the *arguable* finality" of the Virginia judgment (Pet. p. 9 (emphasis added)). This position is inconsistent with its representation in the trial court and clearly self-serving.

C-1; C-3; C-6). Simply stated, LUA chose not to follow the Georgia procedural rules governing matters to be decided by the Court of Appeals.

AWI opposed LUA's motion on the following grounds: (1) no Georgia case law or procedural rule permits raising the *res judicata* or "estoppel by judgment" [2] defenses *de novo* in the Georgia Court of Appeals; (2) the Virginia judgment had not yet been finally concluded; (3) not all of AWI's claims against LUA at issue in the Georgia action were decided in the Virginia action, and not all remaining prerequisites for the application of *res judicata* and collateral estoppel had been met; and (4) LUA's submission of the record of the Virgina judgment was defective ("Opposition to Lumbermen's Underwriting Alliance's Motion to Dismiss," Appendix A).

In a supplemental memorandum to the Court of Appeals, LUA argued, *inter alia*, that the trial court had ignored its motion to dismiss, and that *res judicata* could serve as an alternative basis for affirming the trial court's ruling on the "damages" issue in LUA's favor (LUA's "Supplemental Post-Argument Memorandum," excerpt, Appendix B). This argument by necessity represented to the Court of Appeals that the Virginia judgment had become final while AWI's case was still pending in the trial court. Otherwise, the Virginia judgment could not even arguably serve as an alternative basis for upholding the trial court's ruling on the merits.

The Georgia Court of Appeals summarily denied LUA's motion to dismiss, finding that "the initial pendency of the Virginia . . . action did not serve to abate the instant Georgia action. O.C.G.A. § 9-2-45. Likewise, the subse-

---

[2] The Petition states that LUA is not waiving this defense (Pet. p. 7, n.4). To the extent applicable, this opposition is addressed to both the correctness of denying LUA's motion to dismiss based on its *res judicata* defense and its "estoppel by judgment" defense.

quent finality of the Virginia . . . action is not ground for dismissing the instant appeals. O.C.G.A. § 5-6-48 (b)." *Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance*, 196 Ga. App. 503, 504, 396 S.E.2d 541, 542 (1990) (Pet. App. A at A-2-3).

REASONS FOR DENYING THE PETITION

I. THE GEORGIA COURT OF APPEALS' DECISION RESTS ON "ADEQUATE AND INDEPENDENT STATE GROUNDS" AND IS THEREFORE NOT SUBJECT TO REVIEW BY THE COURT

Contrary to LUA's assertion, the ruling of the Georgia Court of Appeals denying its motion to dismiss does not raise questions respecting the "Full Faith and Credit Clause and the Statute implementing it" (Pet. p. 5). Rather, this case is about LUA's failure to follow proper state appellate procedures and to present the requisite evidence to have the Georgia courts grant full faith and credit to the Virginia judgment.

This Court has long adhered to the principle that it will not review judgments of state courts that rest on "adequate and independent state grounds," which include state appellate procedures. *See, e.g., Parker v. Illinois*, 333 U.S. 571, 574 (1948) (failure to follow state appellate procedure is adequate and independent state grounds for denial of federal right which was waived); *Wolfe v. North Carolina*, 364 U.S. 177, 195-96 (1960) (same). Therefore, contrary to LUA's contention (Pet. p. 10), this case does not present the Court with a question of first impression. For example, this Court specifically held in *Wolfe*, *supra*, 364 U.S. at 195, that:

> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less

> applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan v. Bransford*, 139 U.S. 197; *Brown v. Massachusetts*, 144 U.S. 573; *Jacobi v. Alabama*, 187 U.S. 133; *Hulbert v. Chicago*, 202 U.S. 275, 281; *Newman v. Gates*, 204 U.S. 89; *Chesapeake & Ohio Railway Co. v. McDonald*, 214 U.S. 191, 195." *John v. Paullin*, 231 U.S. 583, 585. "[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." *Nickel v. Cole*, 256 U.S. 222, 225. [footnote omitted].

The Georgia Constitution provides that the jurisdiction of the Court of Appeals is limited to matters that are raised by a notice of appeal or cross appeal. Georgia Const. art. VI, § V, par. III (1983).[10] Georgia law is well settled, and the Court of Appeals strictly adheres to this limitation. *See, e.g., Jordan v. Caldwell*, 229 Ga. 343, 344, 191 S.E.2d 530, 531 (1972) (proper and timely filing of notice of appeal is absolute requirement to confer jurisdiction on appellate court); *Sturdy v. State*, 192 Ga. App. 71, 72, 383 S.E.2d 632, 634 (1989) (role as an intermediate appellate court is limited to correcting lower court's errors of law); *Selfridge v. Morrison Cafeteria Co.*, 192 Ga. App. 469, 470, 385 S.E.2d 137, 139 (1989) (since appellee did not file cross appeal, its motion to remand not properly before court).

As a corollary to the jurisdictional limits of the Court of Appeals under Georgia's Constitution, the Georgia

---

[10] Paragraph III states in pertinent part:

> The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law.

legislature enacted O.C.G.A. § 5-6-48(b) (Pet. p. 5), which provides that an appeal can be dismissed only for three reasons: (1) the notice of appeal is not timely filed; (2) the decision is not appealable; and (3) the question presented is moot.[11] Since none of these enumerated defects existed, the Court of Appeals properly denied LUA's motion to dimiss AWI's appeal.

The statutory limitation on dismissing appeals set forth in O.C.G.A. § 5-6-48(b) serves the legitimate state interest of restricting the jurisdiction of the appellate court to the review of errors of law committed by trial courts. *See, e.g., Wolfe, supra*, 364 U.S. at 196 (requirement that facts be included in record on appeal before being cognizable by state appellate court was adequate and independent state ground).

As specifically noted by this Court in *Webb v. Webb*, 451 U.S. 493, 498 n.4 (1981), a Georgia Supreme Court rule prescribing the manner of presenting the federal issue, which was not followed by petitioner, could present "an independent state procedural ground barring our consideration of the federal issue." Rule 45 of the Georgia Supreme Court Rules, referred to in *Webb*, provided that any enumeration of errors not supported by argument or citation "shall be deemed abandoned." *Id.* Similarly,

---

[11] LUA complains that "it should not now be required to continue battling AWI over identical issues . . ." (Pet. p. 16), and that "the questions presented . . . have become moot" (Pet. p. 18 n.10). As LUA acknowledges, the "assignment" question was not decided by the Virginia judgment (Pet. p. 18 n.10) but was raised in AWI's Georgia appeal. The Georgia appeal, therefore, did not involve "identical issues" decided in the Virginia judgment and could not have been dismissed as moot under O.C.G.A. § 5-6-48(b)(3). Furthermore, contrary to LUA's contention (Pet. p. 18 n.10), the assignment issue relates not only to the current insurance dispute with LUA, but also to the very existence of a contractual relationship between AWI and LUA and to other currently pending coverage claims (Appendix C). In any event, the mootness question involves application of settled principles of Georgia law to the particular facts of this case and does not warrant the Court's review

in this case the Georgia rules limiting the Court of Appeals' jurisdiction and its authority to dismiss valid appeals provide adequate and independent state grounds for declining review of the Petition.

By filing its motion to dismiss *de novo* in the Court of Appeals, LUA admittedly did not follow the Georgia appellate procedure, even though the avenue by which it could have raised its full faith and credit claim in the Court of Appeals "was not only clearly marked, it was also open and unobstructed," as required by this Court. *Parker*, *supra*, 333 U.S. at 575. Here, as in *Wolfe*, *supra*, 177 U.S. at 193, the "state court simply followed [its] settled rule of local practice," and its decision is therefore not reviewable by the Court.

In addition, the Court has frequently reiterated the rule that "when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Webb*, *supra*, 451 U.S. at 495 (citations omitted). While LUA has raised the *res judicata* issue in the Court of Appeals, it has not "done so by a proper presentation," *i.e.*, a notice of appeal. Therefore, the Petition must be denied as it was in *Parker* and *Wolfe*.

Finally, as the Petition points out (Pet. p. 17 n.9), the Georgia legislature implemented the full faith and credit requirement in O.C.G.A. § 24-7-24(a)(2). Therefore, the Georgia legislature was fully cognizant of the constitutional requirement to give full faith and credit to properly authenticated, final foreign judgments when it enacted the restrictions on the jurisdiction and dismissal authority of the Court of Appeals. Neither the Georgia legislature nor the Court of Appeals "ignored" this statute or the United States Constitution, as alleged by LUA (Pet. p. 17 n.9).

II. THE GEORGIA COURT OF APPEALS CORRECTLY DENIED LUA'S MOTION TO DISMISS AWI'S APPEAL ON THE FACTS OF THIS CASE

The Court of Appeals properly denied LUA's motion to dismiss under the facts of this case for the following reasons.

First, LUA did not meet the threshold requirement for invoking the full faith and credit clause. LUA made no showing in the Georgia Court of Appeals that a Virginia appellate court would have dismissed a properly filed appeal based on a *res judicata* defense raised before it *de novo*. The Petition (p. 17 n.9) also ignores the qualifier in the Georgia statute setting forth the full faith and credit obligation, and the full faith and credit clause itself (Pet. p. 4), to the effect that final judgments of sister states shall only be given the *same* effect "as they have . . . *in the courts of such . . . state from which they are taken*" and not more. O.C.G.A. § 24-7-24(a)(2) (emphasis added). Since LUA has made no showing in the Court of Appeals (or the Petition) that a Virginia appellate court would have granted its *de novo* motion, the Georgia Court of Appeals properly denied LUA's motion under its own procedural statute, O.C.G.A. § 5-6-48(b) (Pet. App. A at A-2-3). *See, e.g., Underwriter's Nat'l Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982) (judgment of state court should have *same* credit, validity, and effect in every other court of the United States, as in state where it was pronounced); *Kelly v. Kelly*, 115 Ga. App. 700, 701, 155 S.E.2d 732, 733-34 (1967) (properly authenticated judgment from sister state is generally entitled to have same full faith and credit, *and not more*, than it would receive in state where rendered).

Second, the Court of Appeals correctly denied LUA's motion to dismiss because LUA could have, but did not, appeal the trial court's implicit denial of its motion to dismiss, and thereby waived its *res judicata* defense.

Under O.C.G.A. § 9-11-8(c), as under Fed. R. Civ. P. 8(c), *res judicata* is an "affirmative defense," which can be waived if not properly asserted or pursued. *See, e.g., Trend Dev. Corp. v. Douglas County*, 259 Ga. 425, 383 S.E.2d 123 (1989). LUA's decision not to appeal the trial court's failure to grant its motion to dismiss waived the defense under Georgia law, and precluded LUA from asserting it *de novo* in the Court of Appeals. *See, e.g., Parker, supra* (federal question not taken directly to state supreme court as required was waived). At the very least, LUA's failure to appeal raised questions of fact respecting waiver of the defense, which the Court of Appeals is not authorized to resolve. *See, e.g., Sturdy, supra.*

Third, the Court of Appeals correctly denied LUA's motion because LUA's own inconsistent assertions in the Court of Appeals and the trial court respecting when finality attached to the Virginia judgment created factual uncertainties. The Court of Appeals had no jurisdiction to resolve such questions of fact.

LUA now states that "a dispositive judgment of the Virginia Supreme Court [12] . . . became final during the pendency of the appeal in Georgia . . ." (Pet. p. 10). However, contrary to its current position, LUA unequivocally asserted in the Georgia trial court that the Virginia judgment had become final on March 4, 1989, *i.e., prior to* the LUA order issued by the Georgia trial court on May 30, 1989 (Pet. App. D at D-7). LUA repeated this assertion in the Court of Appeals (Pet. App. C at C-5), while representing simultaneously and inconsistently to the Court of Appeals, that the Virginia Supreme Court's denial of AWI's appeal in September 1989 resulted in a

---

[12] LUA incorrectly describes the Order of the Virginia Supreme Court denying AWI's appeal as a "final judgment" (Pet. p. 7). This Order (Pet. App. B, at B-2-3) is not a "judgment" entitled to "full faith and credit," rather it is only an Order relating to the procedural posture of the Virginia judgment.

"final judgment." *Id.* Indeed, this allegedly new development in September 1989 provided the very basis on which LUA had originally premised its authority to bring a *de novo* motion to dismiss in the Court of Appeals (Pet. App. C at C-6).

In a subsequent submission to the Court of Appeals, LUA again changed its position on finality by arguing that *res judicata* should serve as an alternative basis for affirming the trial court's ruling in its favor on the "damages" question (Appendix B). Obviously, LUA could not and would not have made this argument to the Court of Appeals, if it truly believed the Virginia judgment only became final in September 1989 during the pendency of AWI's appeal, rather than in March 1989, while the case was still pending in the trial court.

To bolster its current position that finality attached during the pendency of the Georgia appeal, LUA mischaracterizes the Court of Appeals' holding as "acknowledging the sister state's judgment became final during the pendency of the appeal" (Pet. p. 11), and as "concluding the Virginia judgment became final during the pendency of the appeal" (Pet. p. 17; p. 18). The Court of Appeals, however, did not "acknowledge" that the Virginia judgment became final during the appeal. Rather, that court stated in plain language that (1) under the Georgia anti-abatement statute, O.C.G.A. § 9-2-45, the initial pendency of LUA's action did not abate AWI's action when filed, and (2) "the subsequent finality of the Virginia action" was not grounds for dismissing the appeal (Pet. App. A at A-2). The Court of Appeals did not voice any opinion as to when, "subsequent" to the filing of AWI's Georgia suit, the Virginia judgment had become final (Pet. App. A at A-5-6).

In sum, the Court of Appeals correctly denied LUA's motion to dismiss on the facts of this case: LUA failed to show that a Virginia appellate court would dismiss an appeal under similar circumstances; it waived the *res*

judicata defense by not appealing the implicit denial of its motion to dismiss in the trial court; and it asserted inconsistent positions with respect to the finality of the Virginia judgment. Under Georgia law, the Court of Appeals had no jurisdiction to resolve the factual issues raised by LUA's *de novo* motion to dismiss and therefore correctly denied LUA's motion on the facts of this case. *See, e.g., Barnes v. State*, 157 Ga. App. 582, 589, 277 S.E.2d 916, 921 (1981) (court of appeals is not a fact-finder or court of original jurisdiction, but a court for correction of errors below).

III. PETITIONER HAS OTHER REMEDIES AVAILABLE TO IT

The Court of Appeals has stayed remand of the case at LUA's request, pending the Court's decision on the Petition. However, once the case is remanded to the trial court, LUA is free to assert any remaining defenses to the insurance coverage sought by AWI.[13] If LUA prevails on any one of these defenses in the Georgia courts, this case will end, and the alleged constitutional question raised by LUA need not be addressed by any court. The Court, therefore, should dismiss the Petition on this basis alone.

CONCLUSION

For all the stated reasons, the Petition should be denied.

Respectfully submitted,

ARNOLD C. YOUNG
Counsel of Record
HUNTER, MACLEAN, EXLEY & DUNN, P.C.
P.O. Box 9848
Savannah, GA 31412
(912) 236-0266

January 3, 1991

---

[13] *See* note 4, *supra*.

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS
STATE OF GEORGIA

Appeal From Superior Court of
Chatham County
No. X87-1019-B

Appeal Nos: A90A0100
A90A0101

ATLANTIC WOOD INDUSTRIES, INC.,
Appellant,

v.

LUMBERMEN'S UNDERWRITING ALLIANCE,
CONTINENTAL CASUALTY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA, and
RANGER INSURANCE COMPANY,
Appellees.

OPPOSITION TO LUMBERMEN'S UNDERWRITING ALLIANCE'S MOTION TO DISMISS

INTRODUCTION

Appellee Lumbermen's Underwriting Alliance ("LUA") has moved to dismiss these appeals on the basis of *res judicata* and collateral estoppel. Appellant Atlantic Wood Industries, Inc. ("AWI") hereby opposes the motion on several grounds: (1) LUA's motion is not properly before this Court; (2) the Virginia action on which LUA relies has not yet been finally concluded;[1] and (3) AWI's

---

[1] The judgment ("Virginia judgment") was rendered in *Lumbermen's Underwriting Alliance v. Atlantic Wood Indus., Inc.*, Law No. 86-L-350 (Henrico C'ty Feb. 10, 1989) ("Virginia action"), and is Exh. E to LUA Memorandum In Support Of Motion To Dismiss ("LUA Mem.").

claims against LUA at issue in this action were not all decided in the Virginia action.

SUPPLEMENTAL SUMMARY OF PERTINENT FACTS AND MATERIAL PROCEEDINGS

LUA bases its Motion on the fact that the Virginia Supreme Court denied AWI's Petition for Appeal in September 1989 on procedural grounds (LUA Mem. p. 3). However, LUA completely fails to mention the fact that in October AWI filed in the Virginia trial court a Motion to correct the judgment ("AWI Motion"),[2] as expressly permitted under Virginia Code § 8.01-428(B) (Exhibit B) and the inherent power of Virginia trial courts. The Virginia trial court's action on AWI's Motion may alleviate the procedural ground that led to denial of the appeal. LUA has filed a Petition For A Writ Of Prohibition in the Virginia Supreme Court, contending that the Virginia trial judge lacks jurisdiction to correct the Virginia Judgment. Both AWI and the Virginia Attorney General have opposed and moved to dismiss LUA's petition. The Virginia Supreme Court has not yet acted.

LUA also fails to mention the fact that prior to the trial court's order under appeal here, it had filed a motion to dismiss the action on the grounds of *res judicata* based on the same Virginia judgment (R. 1542-92). If granted, LUA's motion would have precluded the trial court from reaching the merits of the issues raised by the summary judgment motions. The trial court did not grant LUA's motion to dismiss and instead reached the merits, ruling in favor of LUA on the "damages" question. LUA has not challenged the trial court's failure to grant its motion to dismiss.

---

[2] Certified copies of AWI's Motion and Memorandum In Support ("AWI Mem.") are attached hereto as Exh. A.

ARGUMENT

A. LUA's Motion Is Not Properly Before This Court

LUA has cited no authority permitting *res judicata* to be raised by motion to dismiss in the Court of Appeals rather than in the trial court. LUA's reliance on *Hudgens v. Local 315 Retail, Wholesale & Dept. Store Union*, 133 Ga. App. 329, 210 S.E.2d 821 (1974), *cert. denied*, 424 U.S. 957 (1976) (LUA Mem. p. 3), is entirely misplaced. That case involved a motion to dismiss an appeal based on mootness of the underlying controversy. Unlike *res judicata*, mootness is an issue involving the jurisdiction of the courts, which lack authority to render advisory opinions. Permitting mootness to be raised for the first time on appeal does not mean that non-jurisdictional matters such as *res judicata* can be raised by motion to dismiss the appeal. There are well established procedures and precedents for raising such issues in the trial court, especially when, as here, the action remains pending in the trial court.[3]

Moreover, as noted in *Hudgens*, this Court is "normally limited" to the facts reflected in the record on appeal in making its decisions. 133 Ga. App. at 33, 210 S.E.2d at 823. Permitting motions such as LUA's, which seek to introduce facts not in the record, would disrupt normal appellate procedure. However, even if LUA had chosen the right court, its submission of the record of the Virginia action is defective. As this Court held in *Doyal & Assoc. v. Blair*, 138 Ga. App. 314, 315, 226 S.E.2d 109 (1976), if a prior case is to have *res judicata* effect,

---

[3] As noted by Judge Carley's earlier opinion in this case, "the rationale of retained jurisdiction [by the trial court] enunciated in *Cohran* [*v. Carlin*, 249 Ga. 510, 291 S.E.2d 538 (1982)] extends to the entry of collateral orders by the trial court even as that portion of the case which forms the underlying basis of the interlocutory appeal." *Argonaut Ins. Co. v. Atlantic Wood Indus., Inc.*, 187 Ga. App. 477, 370 S.E.2d 770, 772 (1988).

the entire record must be introduced into evidence. This Court also noted that the forms of law are necessary because "it is through form that all organization is reached." 138 Ga. App. at 317 (citation omitted). LUA's attempt to circumvent the normal appellate rules is especially egregious, since LUA had addressed a similar motion to the trial court (R. 1542-92), which the trial did not grant. If dissatisfied with the basis of the trial court's ruling, LUA's proper remedy would have been an appeal, assigning error to the trial court's decision to rule on the merits, thereby effectively denying LUA's motion to dismiss on *res judicata* grounds.

LUA's reliance on the plea of *puis darrein continuance* and *Teper v. Weiss*, 115 Ga. App. 621, 155 S.E.2d 730 (1967) (LUA Mem. p. 4), is equally misplaced. The common law plea of *puis darrein continuance* was used in Georgia and other jurisdictions prior to the modern rules of civil procedure. It only permitted the filing of a supplemental answer to a complaint in the trial court based on new facts or defenses that had arisen since the filing of the original answer. *See, e.g., Teper, supra*; *accord Cook v. Georgia Land Co.*, 120 Ga. 1068, 48 S.E. 378 (1904); *see generally* 61A Am. Jur. 2d *Pleading* §§ 125, 294 (1981 & 1989 Supp.). This particular plea has never been used to permit original appellate court jurisdiction for a motion to dismiss on *res judicata* grounds. It should not be so used here, especially since the defense presented in LUA's motion is not new.

B. AWI's Pending Motion To Correct Judgment Precludes Application Of *Res Judicata* And Collateral Estoppel Here

Under the "Full Faith and Credit" clause (U.S. Const. art. IV, § 1), " 'the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.' " *Underwriters Nat'l Assur. Co. v.*

North Carolina Life & Acc. & Health Ins. Guar. Ass'n, 455 U.S. 691, 704 (1982) (citations omitted). Therefore, under the full faith and credit clause, the *res judicata* and collateral estoppel effect of a foreign judgment, as opposed to the judgment of a court in the same state, is determined by the law of the state which rendered the judgment. *See, e.g., Boyer v. Korsunsky, Frank, Erickson Architects, Inc.*, 191 Ga. App. 549, 382 S.E.2d 362 (1989). LUA incorrectly describes Virginia law on finality for *res judicata* and collateral estoppel purposes.

Repeating an argument it made without success in the trial court (R. 1542, 1548), LUA states that the Virginia judgment became final under Rule 1:1, *Rules Of The Supreme Court Of Virginia* (LUA Mem. Addend.), and that AWI has totally exhausted the appellate process in Virginia (LUA Mem. pp. 2, 3). Rule 1:1 by its terms only addresses finality of a judgment for procedural purposes after 21 days have passed since entry. Rule 1:1 has expressly been held not to govern when a Virginia judgment is *res judicata* in another action between the parties. *See Prudential Ins. Co. v. Tull*, 524 F. Supp. 166 (E.D. Va. 1981). After surveying applicable Virginia Supreme Court precedent, the district court specifically held in *Tull* "that Rule 1:1 is addressed to the matter of finality only for purposes of defining procedural rights after entry of a judgment." *Id.* at 170.

The possibility of an appeal itself renders the Virginia judgment non-final under the applicable principles. Georgia has long followed the rule that "[a]s long as there remains the possibility that a decision might be overturned by a higher court," no preclusive effect attaches to the judgment. *Greene v. Transp. Ins. Co.*, 169 Ga. App. 504, 506, 313 S.E.2d 761, 763 (1984). Since there is no Virginia law to the contrary, *see Rook v. Rook*, 233 Va. 92, 95, 353 S.E.2d 756 (1987)), this Court is free to apply the Georgia rule respecting the finality of

judgments that may be subject to appeal.[4] The obvious rationale for this rule is judicial economy.[5] The contrary rule advocated by LUA gives rise to "a problem of inconsistent judgments when a judgment under appeal, relied on as a basis for a second judgment, is later reversed." Restatement (Second) of Judgments § 13 comment f (1982).

Furthermore, AWI's motion to correct is based on the authority of Va. Code § 8.01-438(B) and the trial court's inherent power[6] to correct its judgments, both of which are exceptions to the doctrine of *res judicata.* The Virginia Supreme Court has specifically construed Va. Code § 8.01-428(B) and the trial court's inherent power to correct judgments as "creat[ing] exceptions to the finality of judgments. . . ." *School Board v. Scott, Inc.*, 237 Va. 550, 554, 379 S.E.2d 319, 321 (1989). The Virginia judgment LUA seeks to plead here as *res judicata* or as a collateral estoppel bar is thus not final under Virginia law during the pendency of the proceedings initiated by AWI's Motion.

AWI's Motion demonstrates that the Virginia judgment (LUA Mem. Exh. E), as interpreted by the Virginia

---

[4] Under full faith and credit, a state court may apply its own principles if the highest court of the state rendering the judgment has not spoken on a particular point. *See* 50 C.J.S. *Judgments* § 869 (1947 & 1989 Supp.) (if law of state in which judgment is rendered is not proven to be different, finality of judgment may be determined by law of state where judgment is invoked).

[5] On the subject of judicial economy, we note that it was LUA who resisted AWI's efforts to have the Virginia action stayed pending the outcome of AWI's more comprehensive Georgia action (AWI's reply to LUA's Motion to Dismiss, p. 2, n.3, R. 1622, 1623; AWI SJ Br. p. 2, R. 895, 919).

[6] The Virginia Supreme Court held in *Council v. Commonwealth*, 198 Va. 288, 94 S.E.2d 245 (1956), that Virginia trial courts have inherent power to correct their judgments.

Supreme Court, is evidently an incorrect statement of what the trial court ruled on the record prior to entering that judgment. In such circumstances, § 8.01-428(B) and the court's inherent authority specifically permit a correction of the judgment. *See, e.g., Lamb v. Commonwealth*, 222 Va. 161, 163, 279 S.E.2d 389, 391 (1981) (trial court may correct errors arising from oversight or inadvertent omission and not just clerical errors).

The Virginia trial court's granting of AWI's Motion will lay the foundation for an appeal of the very judgment LUA seeks to offer as a bar to this action and these appeals (AWI Mem. p. 12, App. A). It would clearly be inappropriate for this Court to grant *res judicata* effect to a judgment subject to a pending motion to correct and further appeal.

Finally, in apparent recognition of the fact that the Virginia trial court judgment is not final for *res judicata* purposes, LUA also seems to argue that this Court should grant full faith and credit to the September Order of the Virginia Supreme Court denying AWI's petition for appeal (LUA Mem. p. 7). While the Virginia Supreme Court Order finally disposed of AWI's petition for appeal, it is not a "judgment" of a sister state on any issue before this Court. That Order did not decide the "damages" issue sought to be precluded in these appeals. Rather, the Order was a mere procedural one concerning appealability that has no relevant preclusive effect here.

C. LUA Has Failed To Prove That All The Prerequisites For Res Judicata And Collateral Estopppel Are Present Here

For LUA to succeed it must prove that (1) all claims asserted by AWI in this action were conclusively resolved by the Virginia judgment, and (2) this was done in the same cause of action. LUA has not done so.

1. *The Assignment Issue Was Not Decided By The Virginia Trial Court*

LUA complains that it "should not now be required to relitigate the exact same issues against AWI" (LUA Mem. p. 3). However, not all the issues currently before this Court were decided by the Virginia trial court. That court specifically reserved a decision on the "assignment" question (LUA Mem. Exh. E (court "assumes but does not decide that the policies . . . were validly assigned")). Since the assignment question was thus not decided, this appeal and the case below cannot be dismissed with respect to LUA. The assignment issue relates not only to the current insurance coverage dispute, but also to other claims which may entitle AWI to coverage under LUA's policies (*see* AWI's Second Amended Complaint ¶¶ 32, 33, R. 1601, 1605). AWI is therefore clearly entitled to a ruling from the Georgia courts on this issue with respect to LUA.

2. *LUA Has Not Proven That The Causes Of Action Are The Same*

For LUA to succeed it must not only prove that all claims asserted by AWI were conclusively resolved by the Virginia trial court, but also that the same cause of action underlying this case was asserted and decided in the Virginia action. *See, e.g., Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917, 921 (1974), where the Virginia Supreme Court explained the *res judicata*-bar as precluding "relitigation of the *same cause of action*, or any part thereof which could have been litigated. . . ." 202 S.E.2d at 920 (emphasis in original). LUA has not met its burden. LUA's Virginia complaint merely sought declaratory relief. AWI in this action seeks damages for breach of contract, as well as declaratory relief looking to the future. LUA has erroneously relied on Georgia law[7] in its

[7] *McCracken v. City of College Park*, 259 Ga. 490, 384 S.E.2d 648 (1989), and *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d

assertion that the causes of action in the Virginia and Georgia actions are identical, even though Virginia law on this question is available and therefore controlling.

As illustrated by *Carter v. Hinkle*, 189 Va. 1, 52 S.E.2d 135, 128-40 (1949), Virginia law strictly defines what constitutes a cause of action, permitting what in other jurisdictions might be considered a splitting of causes of action. The plaintiff in *Hinkle* had suffered both property damage and personal injury as a result of a single wrongful act (an automobile accident), the Virginia Supreme Court, following the minority view, held that he could maintain two separate actions, one for each injury. This rule appears to be contrary to the general rule set forth in *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d 796 (1980) (LUA Mem. p. 6), that different remedies may not be pursued in different actions. However, since the Virginia Supreme Court has spoken on this question, this Court is bound by the Virginia rule under full faith and credit.

3. *The Prerequisites For Collateral Estoppel Have Also Not Been Met*

LUA's Motion also cannot be granted on collateral estoppel grounds, since it again relies on Georgia cases when controlling Virginia law in available (LUA Mem. p. 7, citing *Greene, supra*). As noted by the Virginia Supreme Court in *Bates, supra*, 202 S.E.2d at 921, collateral estoppel under Virginia law precludes relitigation of "any *issue of fact* actually litigated and essential to a valid and final judgment" (emphasis in original). No issue of fact was litigated in the Virginia judgment, which was decided on summary judgment and addressed only legal questions of contract interpretation. Also, the

---

796 (1980) (LUA Mem. pp. 5-6), involved the *res judicata* effect of Georgia judgments and therefore applied Georgia principles to determine what constitutes the same cause of action.

Virginia Supreme Court specifically pointed out in *Bates* that Virginia courts apply collateral estoppel with "less rigor" than *res judicata*, where the issue resolved is purely a question of law, as in the case here. 202 S.E.2d at 921, n.6. This Court should follow the Virginia rule and apply collateral estoppel here with "less rigor." Such an approach is especially warranted since the Virginia judgment, in determining that the term "damages" in LUA's policies did not cover "response costs," relied solely on federal cases interpreting Maryland law, and construed a Georgia contract without any reference to Georgia law or, for that matter, to Virginia law. It would not make sense for this Court to give the Virginia judgment greater preclusive effect in Georgia than it would have at home.

Of course, the same considerations with respect to the lack of finality of the Virginia judgment and the infirmity of Virginia Supreme Court's Order denying AWI's petition for appeal, set forth above with respect to *res judicata*, also apply here. Collateral estoppel effect cannot be granted in the absence of finality of the judgment pleaded as a bar.

CONCLUSION

For all the reasons set forth above, this Court should dismiss LUA's Motion and proceed with deciding the appeals on the merits.

Respectfully submitted,

By: /s/ Arnold C. Young
ARNOLD C. YOUNG
(Ga. Bar No. 781500)

HUNTER, MACLEAN, EXLEY
& DUNN, P.C.
P.O. Box 9849
Savannah, Georgia 31412
(912) 236-0261

GERALD P. NORTON
Waltraut S. Addy
Adrienne S.W. Williams

PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel for Appellant
Atlantic Wood Industries,
Inc.

[All exhibits referred to in Appendix A have been omitted.]

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for all parties with a copy of the within and foregoing by placing a copy in a properly addressed envelope with adequate postage thereon and depositing in the United States Mail, this day of December, 1989.

This 22d day of December, 1989.

Wray Eckl, Esq.
Jeffrey R. Hill, Esq.
Drew, Eckl & Farnham
P.O. Box 7600
Atlanta, Georgia 30357

James W. Greene, Esq.
Bromley, Brown & Walsh
1625 Eye Street, N.W. #512
Washington, D.C. 20006

Frank B. Miller, Esq.
Mary Louise Kramer, Esquire
Sands, Anderson, Marks & Miller
P.O. Box 1998
Richmond, Virginia 23216-1998

Dennis M. Flannery, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

C. Dale Harman, Esq.
Perry A. Phillips, Esquire
Harman, Owen, Saunders & Sweeney, P.C.
1900 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303

Joseph H. Barrow, Esq.
Beckmann & Pinson, P.C.
P.O. Box 8064
Savannah, Georgia 31412

John M. Thomas, Esq.
Bouhan, Williams & Levy
P.O. Box 2139
Savannah, Georgia 31498

John M. Tatum, Esq.
Miller, Simpson & Tatum
P.O. Box 1567
Savannah, Georgia 31412

Paul W. Painter, Jr., Esq.
Painter, Ratterree & Connelly
P.O. Box 9946
Savannah, Georgia 31412

This 22 day of December, 1989.

/s/ Arnold C. Young
ARNOLD C. YOUNG

APPENDIX B

IN THE COURT OF APPEALS
STATE OF GEORGIA

ATLANTIC WOOD INDUSTRIES, INC.,
Appellant,

v.

LUMBERMEN'S UNDERWRITING ALLIANCE,
CONTINENTAL CASUALTY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA and
RANGER INSURANCE COMPANY,
Appellees.

Appeal From Superior Court of Chatham County
No. X87-1019-B

Appeal Nos. A90A0100, A90A0101

SUPPLEMENTAL POST-ARGUMENT MEMORANDUM OF APPELLEE LUMBERMEN'S UNDERWRITING ALLIANCE

Appellee Lumbermen's Underwriting Alliance ("LUA") respectfully submits this supplemental memorandum to reply to the Supplemental Post-Argument Memorandum of Atlantic Wood Industries, Inc. ("AWI").

I. ARGUMENT

* * * *

B. *The Court of Appeals May Consider LUA's Res Judicata Motion*

* * * *

The procedural history of this matter shows that LUA asked Judge Brannen to dismiss the matter as to it on the basis of *res judicata* after the court had heard oral argument on the various cross-motions for summary judgment, the granting and refusal of which underlie the appeals now under consideration. AWI's assertion notwithstanding, the Superior Court of Chatham County simply ignored LUA's *res judicata* plea, having first reached LUA's summary judgment motion and, moreover, having ruled in LUA's favor on it.

Two bases underlie this Court's power, indeed obligation, to consider LUA's Motion to Dismiss pending before it.

First, under general principles of appellate review, "the appellate court may affirm the judgment where it is correct on any legal ground or theory disclosed by the record, regardless of the ground, reason, or theory adopted by the trial court." 5 C.J.S. Appeal & Error § 1464(1) (1958). The trial court's rationale "may extend to matters which appear in the record and were presented to the lower court, *even though they were ignored* or rejected by that court." *Id.* The Supreme Court of Georgia and this Court routinely apply the general rule that underlies this appellate practice, namely that a judgment, correct for any reason, will be affirmed by the appellate courts. *E.g.*, *Hill v. Willis*, 224 Ga. 263, 267, 161 S.E.2d 281 (1968); *Tierce v. Davis*, 121 Ga. App. 31, 172 S.E.2d 488 (1970).

Judge Brannen apparently undertook consideration of LUA's motions in the order in which they were filed, granted the earlier motion for summary judgment, thus disposing of the case as to LUA, and did not rule on the later-filed plea of *res judicata*. However, as the trial court had the *res judicata* plea before it, this Court may consider the plea of *res judicata* as a basis for dismissing this case as to LUA or affirming the trial court's judgment although not relied upon by the trial court.

* * * *

II. CONCLUSION

For the reasons stated above, and those in LUA's Brief in Support of its Motion to Dismiss, this Court may properly consider the *res judicata* effect of the judgment of the Circuit Court of the County of Henrico and, moreover, must dismiss this action as to LUA.

LUMBERMEN'S UNDERWRITING ALLIANCE

By Counsel

/s/ Mary Louise Kramer
FRANK B. MILLER, III
MARY LOUISE KRAMER
S. VERNON PRIDDY, III
SANDS, ANDERSON, MARKS & MILLER
801 East Main Street, Suite 1400
P. O. Box 1998
Richmond, Virginia 23216-1998
(804) 648-1636

/s/ C. Dale Harman
C. DALE HARMAN
HARMAN, OWEN, SAUNDERS & SWEENEY
1900 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-2600

CERTIFICATE

This is to certify that I have this 27 day of February, 1990, provided all counsel with a copy of the foregoing Supplemental Post-Argument Memorandum of Appellee Lumbermen's Underwriting Alliance by placing the same in the United States mail, with adequate postage thereon, and addressed to:

Arnold C. Young, Esquire
Hunter, Maclean, Exley & Dunn, P.C.
Post Office Box 9848
Savannah, Georgia 31412

Jeffrey R. Hill, Esquire
Drew, Eckl & Farnham
Post Office Box 7600
Atlanta, Georgia 30357

Dennis M. Flannery, Esquire
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

John M. Tatum, Esquire
Miller, Simpson & Tatum
Post Office Box 1567
Savannah, Georgia 31412

Gerald P. Norton, Esquire
Pepper, Hamilton & Scheetz
1300 19th Street, N.W.
Washington, D.C. 20036

Paul W. Painter, Jr., Esquire
Painter, Ratterree & Connolly
Post Office Box 9946
Savannah, Georgia 31412

Joseph H. Barrow, Esquire
Beckmann & Pinson, P.C.
Post Office Box 8064
Savannah, Georgia 31412

James W. Greene, Esquire
Bromley, Brown & Walsh
1050 Seventeenth Street, N.W.
Suite 1200
Washington, D.C. 20036

SANDS, ANDERSON, MARKS & MILLER

/s/ Mary Louise Kramer
MARY LOUISE KRAMER

APPENDIX C*

LUMBERMEN'S UNDERWRITING ALLIANCE

[LOGO]

U. S. Epperson Underwriting Company, Manager
A Member Company of the Lynn Insurance Group
2501 N. Military Trail
Boca Raton, Florida 33431-6398

May 11, 1990

Mr. Arnold C. Young
Hunter, Maclean, Exley & Dunn
P. O. Box 9848
Savannah, Georgia 31412-0048

RE: Matty v. AWI, et al

Dear Mr. Young:

We have reviewed your letter of April 24, 1990 in which you request reimbursement of costs incurred by Atlantic Wood Industries, Inc. in defense of the above referenced matter. For the reasons mentioned in our letters to you dated July 7, 1987 from our General Counsel and August 11, 1987 from our outside counsel, we respectfully decline to provide reimbursement for any costs in the Matty litigation. Copies of those letters are attached.

Yours truly,

/s/ Michael W. Jones
MICHAEL W. JONES
Claims Department Counsel

MWJ/mm
DW2

---

* Business letter reproduced typographically from original.

Attachments [omitted]

cc: Mr. Ronald A. Blake
cc: Mr. I. H. Wicknick
cc: Mr. Frank B. Miller
Sands, Anderson, Marks & Miller
P. O. Box 1998
Richmond, Virginia 23216-1998
cc: File